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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent/Cross-Petitioner

v.

RICARDO J. DELEON, Petitioner/Cross-Respondent

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SUPPLEMENTAL BRIEF

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ORIGINAL

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A. ISSUES

1. Whether, in a criminal prosecution against multiple defendants, statements of gang affiliation made by the defendants in a jail's gang documentation forms, which are intended to prevent rival gang members from being housed together, constituted involuntary statements inadmissible at trial.
2. Whether admission of statements in a jail's gang documentation forms violated the codefendants' confrontation rights.
3. Whether admission of statements in a jail's gang documentation forms was harmless.
4. Whether in this prosecution for first degree assault in which the State sought exceptional sentences based on intent to benefit a street gang, RCW 9.94A.535(3)(aa), the trial court erred in admitting generalized evidence of street gang activity and membership.
5. Whether admitting generalized evidence of street gang activity and membership was harmless error.

B. ARGUMENT

1. DEFENDANTS' STATEMENTS OF GANG AFFILIATION IN A JAIL'S GANG DOCUMENTATION FORMS, PROVIDED TO AVOID BEING HOUSED WITH RIVAL GANG MEMBERS, ARE INVOLUNTARY AND INADMISSIBLE.

a. The Issue Is Properly Raised On Appeal.

An involuntary confession violates a defendant's rights under the Fifth and Fourteenth Amendments. *State v. Unga*, 165 Wn.2d 95, 100-01, 196 P.3d 645 (2008) and *State v. McCullough*, 56 Wn. App. 655, 658, 784 P.2d 566, *review denied*, 114 Wn.2d 1025 (1990); see *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). The test for the voluntariness inquiry is "whether, under the totality of the circumstances, the confession was coerced." *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997) (citing *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S. Ct. 1246, 1251, 113 L. Ed. 2d 302 (1991)).

The government must prove the voluntariness of a defendant's statement by a preponderance of the evidence. *State v. Abdulle*, 174 Wn.2d 411, 420, 275 P.3d 1113 (2012) (citing *Lego v. Twomey*, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972)).

[W]hen a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the

prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.

*Lego v. Twomey*, 404 U.S. 477, 489, 92 S. Ct. 619, 626-27, 30 L. Ed. 2d 618 (1972). A trial court's determination on the ultimate issue of "voluntariness" is a legal determination, subject to independent, de novo review. *State v. Butler*, 165 Wn. App. 820, 827, 269 P.3d 315 (2012); *Miller v. Fenton*, 474 U.S. 104, 110, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985); *Derrick v. Peterson*, 924 F.2d 813, 817 (9th Cir.1990), *cert. denied*, 502 U.S. 853 (1991).

The State contends this issue cannot be considered because the record does not include evidence relating to "the location, length, and continuity of the interrogation, and the defendant's maturity, education, physical condition, and mental health." State's Petition for Review at 8. The State does not suggest any circumstances that would mitigate the coercive effect of the gang documentation booking procedure. As Division 3 noted, the question of gang affiliation was presented to the defendants in the context of housing: "Is there anyone they cannot be housed with." The record shows the defendants responded by acknowledging some degree of gang involvement, and the officer's testimony made it clear that they raised the issue of gang affiliation because of the known danger of housing members of rival gangs together.

The record is sufficient to demonstrate that the defendants were aware that identifying the gangs with which they were in any way associated was necessary for their personal safety. The issue before this court is whether that record demonstrates coercion rendering the defendants' responses involuntary and therefore inadmissible under the Fifth and Fourteenth Amendments.

b. The Totality Of The Circumstances Demonstrates The Coercive Nature Of The Booking Officer's Questions Regarding Gang Affiliation.

The State makes much of the Court of Appeals decision's reference to a line of cases that began with *Bram v. United States*, 168 U.S. 532, 542–43, 18 S. Ct. 183, 42 L. Ed. 568 (1897). Under *Bram*, a statement might be found involuntary if it was “extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence.” *Id.* The State suggests that Division 3 applied this standard in determining the gang form statements were involuntary. On the contrary, Division 3 correctly identified the applicable standard and merely referenced *Bram* and its progeny for the proposition that implied threats or promises may, depending on the circumstances, be sufficient to coerce an involuntary statement. (DeLeon at Para 31-32, 65)

The State suggests that, because “indirect promises do not have the potency of direct promises” in the absence of a direct threat or promise to provide protection from rival gangs, the State’s actions are insufficiently coercive to render the defendants’ responses involuntary. *Hawkins v. Lynaugh*, 844 F.2d 1132, 1140 (5th Cir. 1988) (quoting *Miller v. Fenton*, 796 F.2d 598, 609 (3d Cir. 1986)). In *Hawkins*, the officer “made no direct promise of leniency but only a direct promise to get Hawkins help, which could be considered at most an implication of leniency.” *Id.* The quoted language merely represents a fact-specific application of the broader standard: “The totality-of-the-circumstances test specifically applies to determine whether a confession was coerced by *any express or implied promise* or by the exertion of any improper influence.” *State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008) (emphasis added) (citing *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997)); *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (abrogating test stated in *Bram*).

At least one federal court has recognized that questioning an inmate about gang affiliation as part of the booking process is inherently coercive. *United States v. Williams*, No. 13-CR-00764-WHO-1, 2015 WL 5138517, at \*1 (N.D. Cal. Sept. 1, 2015):

[T]o protect himself [the defendant] had pressure to answer the gang question. While the question may be legitimate, the answer should not be used both to protect and convict the defendant. A defendant should not be faced with a Hobson's choice of telling the truth and giving evidence that will be used against him at trial or lying and being placed at risk in the general population of the jail.

*United States v. Williams*, 2015 WL 5138517, at \*3.<sup>1</sup>

Here, the officer specifically referenced the issue of where the defendants would be housed, asking if there were “certain individuals or certain groups [they] can’t be housed with.” (Allred Supp RP 44) And according to the State’s own witnesses, Officer Saenz’s sole interaction with the defendants was to obtain information regarding their gang affiliation; he did not participate in other aspects of the “routine” booking procedure. (Allred Supp RP 27) Officer Saenz explained that he only completes the detailed Gang Information Form after the inmate has identified the group with which he should not be housed. (Allred RP 47) Thus the identification of the inmate’s gang affiliation, and the detailed information regarding the gang’s identifying signals and the inmate’s involvement with the gang are only requested after the inmate has

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<sup>1</sup> As the Court of Appeals opinion states, the issue of whether the gang affiliation questions were immunized by Miranda warnings as part of “routine booking” questions is not the issue presented here. The court nevertheless addressed the issue briefly, and a more detailed analysis of the “routine booking question” exception is available at *People v. Elizalde*, 61 Cal. 4th 523, 538, 351 P.3d 1010 (2015).

acknowledged that he will not be safe when housed with some other gang or gangs. In short, the defendants' statements to Officer Saenz were made in response to the implied promise of safe housing, a somewhat more substantial promise than mere "leniency." (Allred RP 32-54)

c. Due Process Requires The Exclusion Of Involuntary Statements Regardless Of The State's Reasons For Coercing Them.

The State suggests that because the booking officer needs the information to ensure the safety of inmates, questions about a defendant's gang affiliation should not be excluded regardless of whether the circumstances are coercive. The State is, in effect, suggesting the information is admissible at trial under a good faith exception to the exclusionary rule. The State cites no authority for the existence of such an exception and, indeed, the authority seems to be to the contrary. See *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 2101, 100 L. Ed. 2d 704 (1988) (implicitly rejecting "good faith" argument); *United States v. Scalf*, 708 F.2d 1540, 1544 (10th Cir.1983) (per curiam); *White v. Finkbeiner*, 687 F.2d 885, 887 n. 9 (7th Cir.1982) (declining to create exception absent clear indication from United States Supreme Court), *vacated on other grounds*, 465 U.S. 1075, 104 S. Ct. 1433, 79 L. Ed. 2d 756 (1984).

The State's reasoning is based on the premise that when the State obtains evidence needed for the safety of the accused, and the evidence is obtained in good faith, the State should not be deprived of the use of such evidence at trial. But this reasoning assumes that the purpose of the exclusionary rule is to deter or punish the State's action in coercing the required information, a purpose that is not furthered by excluding evidence the police obtained in good faith. The State misapprehends the purpose of the exclusionary rule in the context of the Fifth Amendment.

“[I]n requiring exclusion of an involuntary statement of an accused, we are concerned not with an appropriate remedy for what the police have done, but with something which is regarded as going to the heart of our concepts of fairness in judicial procedure.” *Mapp v. Ohio*, 367 U.S. 643, 684-85, 81 S. Ct. 1684, 1707, 6 L. Ed. 2d 1081 (1961). “The use of evidence obtained through coercion offends “an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system . . . .” *Rogers v. Richmond*, 365 U.S. 534, 540, 81 S. Ct. 735, 739, 5 L. Ed. 2d 760 (1961). Accordingly, “[t]he State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.” *Id.* at 541.

The State suggests that if statements obtained through coercion may not be used at trial then it follows that the information, which in this case is deemed necessary for the safety of jail inmates, cannot be obtained at all. The exclusionary rule does not preclude the State's asking questions that may elicit incriminating information; it merely bars the use of such statements in evidence at the defendant's trial:

The pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not, apart from the use of the confession at trial, necessarily involve independent Constitutional violations. What is crucial is that the trial defense to which an accused is entitled should not be rendered an empty formality by reason of statements wrung from him, for then 'a prisoner (has been) made the deluded instrument of his own conviction.' 2 Hawkins, Pleas of the Crown (8th ed., 1824), c. 46, s 34. That this is a procedural right, and that its violation occurs at the time his improperly obtained statement is admitted at trial, is manifest.

*Mapp v. Ohio*, 367 U.S. 643, 684-85, 81 S. Ct. 1684, 1707, 6 L. Ed. 2d 1081 (1961).

The error in the present case did not arise when the booking officer asked Ricardo DeLeon about his gang affiliation as a condition of affording him safe housing, but rather when his answers were admitted into evidence at his trial. "[C]onvictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand." *Rogers v.*

*Richmond*, 365 U.S. 534, 540-41, 81 S. Ct. 735, 739, 5 L. Ed. 2d 760 (1961).

2. THE TRIAL COURT ERROR IN ADMITTING GENERALIZED EVIDENCE OF STREET GANG ACTIVITY AND MEMBERSHIP WAS NOT HARMLESS.

Because of First Amendment implications, evidence of gang affiliation is only admissible if there is a connection between the offense and the affiliation. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009). Evidence of gang affiliation is considered relevant where it shows a connection between the gang's "purposes or values" and the offense committed. *Id.* at 527. In *Scott*, the court recognized that when motive is derived from the collective action of codefendants, absent evidence a defendant was a member of a gang, gang membership is not relevant to show the motive for the offense. 151 Wn. App. at 529-30. Here, as in *Scott*, the evidence "fell far short of proving the connection between gang affiliation" and Ricardo DeLeon's complicity in the charged offense. 151 Wn. App. at 528. Indeed, evidence of his alleged gang affiliation was trivial to non-existent. Accordingly, the evidence of the gang expert regarding gang hierarchy etc. had little if any relevance to the issue of Ricardo DeLeon's guilt. In determining the relevance of gang testimony outweighed its prejudicial effect, the trial court abused its discretion.

Absent evidence that Ricardo DeLeon shared the gang's purposes or values, there is no basis for inferring he committed the assault or acted as an accomplice to an allegedly gang-motivated assault.

The failure to connect the gang evidence to support both the stated motive and as a basis for demonstrating concerted activity presents a significant probability that the error was not harmless. Most certainly it does not establish that the error most probably did not materially affect the verdict.

*State v. Scott*, 151 Wn. App. 529.

Jury was instructed to consider the Gang Documentation Form evidence solely with respect to the sentencing enhancement. With nothing more than evidence that Ricardo DeLeon was wearing red clothing at the time of the offense, a jury could only find a connection between him and the alleged gang-related motives by over-generalizing from the substantial irrelevant gang-related evidence presented by the State. This error was not harmless.

#### C. CONCLUSION

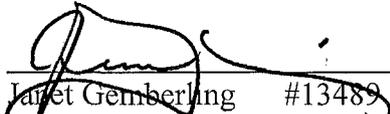
This court should hold that questioning a defendant about his gang affiliation in the course of jail booking is coercive and, in light of legislation imposing sanctions specifically related to gang affiliation, reasonably likely to elicit incriminating statements; that the use of such

statements at a subsequent trial violates the Fifth and Fourteenth Amendments; and in this case the error was prejudicial beyond a reasonable doubt. The court should further hold that when a defendant is charged as an accomplice, the State's theory of the case is that his complicity is motivated by affiliation with a criminal street gang, and evidence of his gang affiliation essentially consists of his wearing a significant amount of red clothing, the State's introduction of inflammatory expert testimony alleging irrelevant but repugnant aspects of gang culture is irreparably prejudicial and the trial court errs in denying a motion for mistrial.

Ricardo DeLeon's conviction should be reversed and the matter remanded for a new trial. At a minimum, the reversal of the aggravated sentence should be affirmed.

Dated this 8th day of December, 2015.

Respectfully submitted,

  
Janet Gemberling #13489  
Attorney for Petitioner/Cross-Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 911851
vs.	)	
	)	CERTIFICATE
RICARDO J. DELEON,	)	OF MAILING
	)	
Petitioner.	)	

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I certify under penalty of perjury that on this day I served a copy of the Supplemental Brief in this matter by email on the following attorneys, receipt confirmed, pursuant to the parties' agreement:

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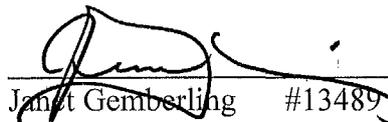
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Dear Clerk,

Attached for filing please find Mr. DeLeon's Supplemental Brief in this matter.

Thank You,

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